Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NAM NGUYEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Immigration and Naturalization Service (INS), the Attorney General of the United States, and the INS District Director in Seattle, Washington. Petitioners were respondents in the district court and appellants in the court of appeals. Respondent is Nam Nguyen, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court granting the petition for writ of habeas corpus (App., *infra*, 3a-4a) and the report and recommendation of the magistrate judge adopted by the district court (App., *infra*, 5a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

* * * * *

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Vietnam. App., *infra*, 8a. He entered the United States as a refugee in 1984, and later adjusted his status to lawful permanent resident. *Ibid.*

On January 22, 1999, the Immigration and Naturalization Service (INS) served respondent with a notice to appear for removal proceedings, charging respondent with being subject to removal from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998), because he had been convicted of an aggravated felony, as defined in 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998). Administrative Record (A.R.) L43-L44; App., *infra*, 8a. That charge was based on respondent's conviction in state court on June 13, 1991, of robbery. A.R. L29-L30, L43-L44.

Respondent was convicted on that date of seven counts of robbery in the second degree. A.R. L17-L18. He was sentenced to serve a total of 15 years, which included a four-year sentence enhancement on one count for having used a firearm in the commission of the robbery. *Ibid.* Respondent was found to have used a firearm in the commission of four of the other robberies as well, and to have been armed with a firearm when committing all seven of the robberies. The court, however, stayed the sentencing enhancements on the other counts. *Ibid.* (citing Cal. Penal Code §§ 12022(a)(1) and 12022.5(a)). Respondent had been charged in five of the robberies along with two other defendants, and on each count it had been alleged that the offense was "committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members," in vio-

lation of Cal. Penal Code § 186.22(b)(1). A.R. L21-L27. In addition, respondent had been convicted on September 28, 1990, of attempted burglary and attempted grand theft auto. A.R. L27, R12-R13.

Respondent was transferred to the custody of the INS on January 22, 1999, pursuant to a previously lodged detainer. 8/3/99 Custody Review Worksheet 1.

b. On February 10, 1999, an immigration judge found that respondent was subject to removal as charged. A.R. L7. The immigration judge ordered that respondent be removed to Vietnam. *Ibid.* Respondent did not appeal that order to the Board of Immigration Appeals, and thus his removal order became final. A.R. R9-R10; App., *infra*, 8a.

c. On March 17, 1999, the INS requested travel documents for respondent from the consulate of Vietnam. A.R. L6. The Vietnamese government has not responded to the request, and therefore the INS has been unable to effectuate respondent's removal. 8/3/99 Custody Review Worksheet 2. The INS continued to detain respondent under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), subject to periodic administrative reviews of his custody. Following an interview of respondent, during which he was assisted by counsel, the INS informed respondent on August 4, 1999, that he would be continued in INS detention and his custody would be reviewed next in February, 2000. Letter from Assistant District Director Morones (Aug. 4, 1999). An INS headquarters review panel reviewed that August 4, 1999, custody decision and agreed with the determination to continue respondent in custody, citing the circumstances surrounding his most recent criminal conduct and indicating that respondent had not demonstrated that he would not pose a threat to the community if released. 9/7/99 Headquarters Review

Committee; Letter from Assistant District Director Morones (Sept. 24, 1999).

2. a. Meanwhile, on July 13, 1999, respondent filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Western District of Washington, challenging the constitutionality of his continued detention. App., *infra*, 5a. On February 1, 2000, the district court adopted the report and recommendation of a magistrate judge and granted the respondent's habeas corpus petition. *Id.* at 3a-4a. The court applied the standards set forth in the joint order of five judges of the district court in *Phan* v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), for evaluating such constitutional challenges to continued detention beyond the initial 90-day removal period. See App., *infra*, 5a-7a. The court concluded that there is no realistic prospect that respondent would be removed to Vietnam in the foreseeable future and noted that the court already had reached that conclusion in two other cases involving aliens ordered removed to Vietnam. *Id.* at 7a. The court ruled that, in such circumstances, respondent's continued detention by the INS was excessive under the standards set forth in *Phan*. *Ibid.* The court also found that respondent's interest in release outweighed the government's interest in continuing him in detention to ensure the safety of the community. *Id.* at 7a-8a.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the

alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On August 14, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Be-

cause the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35291
DC# CV-99-813-RSL
Western Washington (Seattle)

NAM NGUYEN, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Filed: Aug. 14, 2000]

ORDER

Before: WALLACE, SCHROEDER and THOMAS, Circuit Judges

The court has received and reviewed the parties' responses to this court's order to show cause why summary disposition would not be appropriate in light of *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. ___ (U.S. July 5, 2000) (No. 00-38). Appellant's opposed request that the court hold this appeal in abeyance pending the United States Supreme Court's disposition of appellant's petition for writ of certiorari in *Ma* is denied.

Pursuant to *Ma*, the court grants appellee's opposed request for summary affirmance of the district court's judgment.

Appellant's motion for reconsideration of the court's June 2, 2000, order is denied as moot.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-0813L
INS #A27-317-255

NAM NGUYEN, PETITIONER

v.

JANET RENO, ET AL., RESPONDENTS

[Filed: Feb. 1, 2000]

ORDER REGARDING OCTOBER 7TH
REPORT AND RECOMMENDATION

This matter comes before the Court on Respondents' Objections to the Magistrate Judge's Report and Recommendation. In reviewing the Report and Recommendation, the Court has considered the documents that were before the Honorable Ricardo S. Martinez, United States Magistrate Judge, when he issued his Report and Recommendation, the parties' briefs in response to the Report and Recommendation, and the additional evidence offered by respondents in support of their objections.

This decision was delayed pending Judge Rothstein's consideration of the government's additional evidence regarding the possibility of repatriation to Vietnam.

Judge Rothstein has now concluded that, despite a recent initiative by the United States, there is no realistic chance that the government will effectuate deportation to Vietnam in the foreseeable future. *See Duong v. Reno*, C99-0930R (W.D. Wash. January 28, 2000). The Court concurs in that opinion and therefore adopts Judge Martinez' Report and Recommendation.

The petitioner's petition for habeas corpus is GRANTED. He shall be released from INS detention within two business days after entry of this Order, subject to reasonable conditions set by the INS. The Clerk of the Court is directed to send copies of this order to Judge Martinez, petitioner, and counsel of record for respondents.

DATED this 1st day of February, 2000.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-813L

NAM NGUYEN, INS #A27-317-255, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENTS

[Filed: Oct. 7, 1999]

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Nam Nguyen, a Vietnamese citizen, is in custody of the Immigration and Naturalization Service (INS) at the Federal Detention Center (FDC) at Seattle, Washington awaiting deportation. He has filed this petition for habeas corpus pursuant to 28 U.S.C. § 2241, alleging that his indefinite detention is unconstitutional. The petition is but one of more than one hundred such petitions filed by persons who have been detained indefinitely by the INS while awaiting deportation to countries which refuse to receive them. Concerned about this situation, this Court selected five "lead" cases to represent the common issues presented by the petitioners, appointed counsel to represent them, and held a hearing. On July 9, 1999, the Court

issued a Joint Order in *Phan v. Reno*, C98-234Z, C99-151L, C99-177C, C99-185R, and C99-341WD (1999 WL 521980), setting forth a procedural framework for the analysis of each petitioner's substantive and procedural due process claims. The Joint Order is incorporated herein by reference and will only be summarized here.[1]

First of all, the Court found it had jurisdiction to consider the constitutionality of a petitioner's indefinite detention in the context of a § 2241 petition. Next, the Court determined that a petitioner need not exhaust administrative remedies before seeking a writ of habeas corpus pursuant to § 2241. Finally, the Court set forth a framework for analysis of the due process issues presented in each individual petitioner's case. The critical inquiry in that regard is whether an alien's continued detention is excessive in relation to the government's legitimate interest in (a) ensuring the removal of an alien who has been ordered deported, and (b) protecting the public from dangerous felons. *See Phan v. Reno*, Nos. C98-234Z, at 6. The Court concluded that:

> Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.

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[1] The Joint Order establishes the law in this district regarding the "indefinite detention" cases. The issues therein will not be revisited here despite the objections of the INS set forth in its Status Report. The Court recognizes that such objections may be presented in order to preserve them for appeal.

Id.

This Court has already concluded, in two of the "lead" cases, that the likelihood that persons such as petitioner can be deported to Vietnam in the foreseeable future is minimal, because the United States does not have a repatriation agreement with that country. *Huynh v. Reno*, C99-177C, 1999 WL 521984 at *4 (W.D. Wash. July 9, 1999); *Phan v. Smith*, C98-234Z, 1999 WL 521982 at *3 (W.D. Wash. July 9 1999). Although the government asserts that it is attempting to establish negotiations with Vietnam regarding a repatriation agreement, there is no evidence in the file indicating that such negotiations are actually underway, much less when they might conclude. James Hergen, Assistant Legal Advisor for Consular Affairs, states in his declaration that he anticipated presenting a proposed agreement to the Socialist Republic of Vietnam (SRV) within thirty days of July 31, 1999, but there is no indication in the record that this has actually been done. Dkt. #12, Attachment, p. 3. Further, he admits in his declaration that "[b]ecause of the very nature of such negotiations, it is not possible to predict when they may conclude." *Id.* Thus, the government has failed to demonstrate a realistic chance that petitioner may be deported in the foreseeable future. Under the standards set forth in *Phan v. Reno*, his detention is "excessive", and his petition for habeas corpus should be granted.

DISCUSSION

Petitioner was born in Vietnam in 1971. Administrative Record (AR) at L0011. He entered the United States as a refugee in 1984 at the age of thirteen, and later was granted lawful permanent resident status retroactive to that date. AR at R0023. On June 13, 1991, he was convicted in California of multiple counts of second degree robbery, and sentenced to a term of fifteen years, of which he served eight. AR at L0022-27; L0052. As petitioner was found to have committed an aggravated felony, the INS took him into custody in January, 1999, and instituted deportation proceedings against him. AR at L0041, 42, 45. A final order of deportation was entered February 10, 1999. AR at L0007. Petitioner waived appeal, and that Order is not at issue here. As Vietnam will not accept petitioner for repatriation, he has remained in INS custody since that date and will do so indefinitely, absent some relief from this Court.

As there is no indication in the record that petitioner's deportation to Vietnam can be accomplished in the foreseeable future, his continued indefinite detention is "excessive" within the meaning of *Phan v. Reno*, and violates his right to substantive due process. A literal reading of the Joint Order would suggest that this finding alone warrants the granting of his petition for habeas corpus. However, in the event the Court interprets that Order to require a balancing of petitioner's interest in release against the Government's interest in protecting the public, his risk of flight and future dangerousness will be evaluated.

Petitioner's crime spree occurred in 1991, and he has been in custody ever since. Therefore, there is no individualized evidence in the record regarding either his risk of flight or possible future dangerousness. Petitioner's criminal history cannot be considered as evidence of his potential danger to the community, due to double jeopardy concerns. On the other hand, there is a letter of support from his parents, expressing their belief that their son had matured "enough not to commit any further mistake." Dkt. #13, Exhib. C. They have arranged for him to live with his sister in Michigan and manage her nail salon there. *Id.*

In summary, in the absence of direct evidence that petitioner presents a significant risk of flight, or that he poses a serious danger to the community, it appears that the government's interest in extending his detention indefinitely is not great. To the extent that the Joint Order requires a balancing of this interest against petitioner's right to be free from excessive detention, it is petitioner's constitutional right which must prevail. Accordingly, the Court should find that petitioner's continued detention violates his substantive due process rights, and grant his petition for habeas corpus.

CONCLUSION

As there is no realistic possibility that the government will effectuate petitioner's deportation to Vietnam in the foreseeable future, his continued detention violates his substantive due process rights as set forth in the Joint Order. Even if the Court should decide to balance petitioner's rights against the government's interest in detaining petitioner to ensure the safety of the community, the balance tips sharply in favor of petitioner. Accordingly, his petition for habeas corpus

should be granted, and he should be released immediately, subject to reasonable conditions set by the INS. Such conditions may include those set forth in 8 C.F.R. § 241.5(a). A proposed form of Order reflecting this recommendation is attached.[2]

DATED this 7 day of October, 1999.

/s/ RICARDO S. MARTINEZ
RICARDO S. MARTINEZ
United States Magistrate Judge

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[2] In order to expedite this case as directed by the district court, the usual time for objections to the Report and Recommendation has been shortened. See the cover letter attached to this Report and Recommendation.